No. 81-2108

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In The

Supreme Court of the United States

October Term, 1981

JUAN CORCHADO,

Petitioner,

vs.

PUERTO RICO MARINE MANAGEMENT, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Where in a Jones Act case, the district judge has dismissed the case, without a hearing, pursuant to Rule 37(b) of the Federal Rules of Civil Procedure, so as to deprive the seaman of his remedies under the statute, and has further denied, without a hearing, the plaintiff's Rule 60(b) motion for reconsideration, was there such complete absence of probative facts and mitigating circumstances essential to warrant the imposition of dismissal as a "just" sanction within the due process requirements of Rule 37(b) so as the lead the court of appeals to find that the district judge had not abused his discretion?

2. If the court of appeals erred in holding that there was no abuse of discretion by the district court, should the case be remanded for a hearing on the issues or otherwise be restored to the trial calendar?

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No.

In The

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October Term, 1981

JUAN CORCHADO,

Petitioner,

vs.

PUERTO RICO MARINE MANAGEMENT, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Juan Corchado, the petitioner herein prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in the above entitled case on December 8, 1981.

OPINIONS BELOW

1. First Circuit Court of Appeals Order Denying Rehearing *En Banc* dated and entered February 1, 1982 is printed in the appendix hereto, *infra,* page 1a. It is not officially reported.

2. First Circuit Court of Appeals Order Denying Rehearing dated and entered January 15, 1982 is printed in the appendix hereto, *infra*, page 3a. It is not officially reported.

3. First Circuit Court of Appeals Opinion and Judgment affirming District Court Order dated and entered December 8, 1981 is printed in the appendix hereto, *infra*, page 4a. It is officially reported at 665 F.2d 410.

4. District Court Order dated April 13, 1981 denying reconsideration is printed in the appendix, *infra*, page 13a. It is not officially reported.

5. District Court Memorandum and Order dated February 11, 1981 is printed in the appendix hereto, *infra*, page 16a. It is not officially reported.

6. Magistrate's Report and Recommendation dated January 26, 1981 to dismiss the case is printed in the appendix hereto, *infra*, page 14a. It is not officially reported.

JURISDICTION

1. The judgment of the United States Court of Appeals for the First Circuit was made, entered and filed on December 8, 1981. A timely petition for rehearing was denied on January 15, 1982. A similar petition for rehearing *en banc* was denied on February 1, 1982.

2. The time for filing this petition would ordinarily have expired within ninety days from January 15, 1982.

3. By order dated April 1, 1982, the Honorable Mr. Justice J. Brennan, Jr., Circuit Judge for the First Circuit granted an

extension of time until May 15, 1982. This petition for certiorari is filed within that time.

4. This is an action by an American seaman pursuant to 28 U.S.C. §1916 providing for waiver of prepayment of fees and costs.

5. This Court's jurisdiction is invoked under 28 U.S.C. §1254(.).

STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States, the Jones Act (46 U.S.C. §688), the Magistrate's Act (28 U.S.C. §636(b)(1), and the Federal Rules of Civil Procedure, Rules 37(b), 41(b), and 60(b) are printed in the appendix annexed hereto, *infra,* at pages 34a-40a.

STATEMENT OF THE CASE

Preliminary Statement

This case arises out of the dismissal of a seaman's action by a district judge because of the failure of his attorneys to fully comply with the orders of the court as to discovery and their failure to attend a pretrial conference. This is not a case wherein the injured petitioner failed to prosecute his claim or to comply personally with discovery orders. On the contrary, although he only had a few hours in port each week, the petitioner conscientiously submitted himself on three different occasions for physical examination by the respondent's doctor. He was deposed by the respondent and, within the time limitations inherent in his work as a seaman, he tried to ensure that the litigation proceeded in a timely manner.

It is conceded that a serious communication failure existed between Puerto Rican counsel for the petitioner so as to create confusion as to their respective roles in the case. It is conceded that counsel did not file answers to the respondent's interrogatories on time. No prejudice to the respondent was ever demonstrated. The question here presented is simply this: if sanctions were necessary, were there not sufficient alternatives to the drastic, harsh and irreparable extinguishing of a valid and justified cause of action by an American merchant seaman who demonstrated no recalcitrance and ought not the court to have considered facts in mitigation so as to determine the appropriate sanction?

Statement of Facts

Juan Corchado had suffered two serious knee injuries while working aboard the S.S. Fortelleza, owned and operated by respondent Puerto Rico Marine Management, Inc. He invoked the jurisdiction of the federal district court pursuant to the Jones Act, 46 U.S.C. §688 and elected, under that Act, to try the case to a jury. Through New York counsel Bernard Rolnick, Corchado retained Puerto Rican attorney Wilfredo Geigel who filed a complaint in the district court in Puerto Rico on March 21, 1980. The United States Marshal served the complaint in June 1980. The respondent filed an answer on July 8, 1980, together with discovery requests which included a lengthy set of interrogatories and a notice of deposition.

Corchado was deposed on August 13, 1980. He had previously contacted a second attorney, Harry Ezratty, asking him to handle the case. Ezratty refused to take over the case but agreed to consult with Geigel and to attend the deposition with Geigel. The nature of Ezratty's appearance at the deposition and his role in the case was to become a crucial factor in the court's decision to dismiss the case.

The respondent began filing motions to compel discovery on November 14, 1980, just prior to the time of the first status conference. The respondent claimed that the petitioner had repeatedly failed to appear for a physical examination (R66). Geigel refuted this allegation, informing the court that Corchado had appeared for the physical examination on three separate occasions despite the brief time he spent in port and had been kept waiting for several hours on each of these occasions without being seen (R77). At a status conference on November 20, 1980, the parties were given until January 16, 1981 to complete discovery; a pretrial conference was set for January 23, 1981.

On December 8, 1980, the respondent filed a motion to compel answers to its interrogatories. Geigel filed an informative motion which outlined the difficulties he experienced in meeting with Corchado (R81). The respondent's motion was denied and counsel for petitioner was given until December 15, 1980 to file answers and warned that sanctions might follow. On December 15, 1980, a trial date was set for February 17, 1981.

On December 23, 1980, the respondent filed a motion for sanctions. Geigel again informed the court of his continued difficulties in communicating with Corchado and the respondent's motion was denied. The petitioner was given until January 16, 1981 to file the answers. Because Geigel was about to leave Puerto Rico, Ezratty agreed to prepare the answers.

On January 23, 1981, Geigel filed a motion to withdraw as counsel and asked that the petitioner be given a reasonable time to retain new counsel (R98). The motion was granted at the pretrial conference on January 26, 1981, at which time the defense counsel claimed that Ezratty had entered the case in August 1980 since he had stated at Corchado's deposition that he was " co-counsel." Without any inquiry as to whether Ezratty had filed a formal notice of appearance with the court, the magistrate adopted the

respondent's statement as to Ezratty's role in the case and erroneously recorded an alleged notice of appearance as of August 1980, placing it on the docket five months later. *See* appendix, 30a.

At the pretrial conference, the respondent filed a motion for sanctions for failure to answer the interrogatories. However, defense counsel was fully aware that the answers had, in fact, been prepared. He failed to so inform the magistrate who consequently recommended dismissal of the complaint for failure to comply with discovery orders (R103). Geigel filed his objections timely on February 2, 1981, asked for reconsideration and prayed that the magistrate's recommendations be not adopted (R105). He pointed out that the answers were delivered and that the defense counsel's silence at the pretrial conference misled the magistrate. Upon the objections being filed, the district judge was bound by law, 28 U.S.C. §636(b)(1), to make a *de novo* determination of those portions of the report of the magistrate to which objections were made. The court failed to do so and instead adopted the magistrate's recommendation without such *de novo* determination on February 11, 1981.

As of February 11, 1981, the date of the status conference before Judge Gierbolini, Geigel was no longer in the case but Ezratty had not entered his appearance. No one appeared for Corchado who was, therefore, without legal representation when the district judge, without a hearing, dismissed the complaint with prejudice by expressly adopting the magistrate's recommendation in spite of the fact that, as the judge himself noted, the answers to the interrogatories had been delivered (R113).

On February 25, 1981, Ezratty filed an omnibus motion for reconsideration pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. He brought to the court's attention, the following considerations:

"1. The interrogatories were ready and have in fact been served. The Magistrate was unaware of this when he made his recommendations.

2. At the Pre-Trial Conference, the Magistrate was misinformed that my office was representing the plaintiff. Pursuant to our agreement I was not to assume representation until this matter was resolved.

3. The status of plaintiff as a ward of this Court was not brought out to the Magistrate's attention in an effort to ameliorate his recommendation.

4. The seriousness and permanence of plaintiff's injuries were not set forth to the Magistrate or this Court.

5. This Court was under the impression that I was a substituted attorney and failed to appear at the Status Conference in contempt of this Court. As previously pointed out, this was not true."

Geigel also filed a motion for reconsideration. Both motions were vigorously contested by the respondent. The court expunged Geigel's motion although it contained facts relevant to the question of counsel's "willfulness." *See* appendix, 31a. At no time was petitioner's personal willfulness a question.

Clearly, there were questions of fact seriously in dispute. Yet, on April 13, 1981, without a hearing, the court denied Ezratty's Rule 60(b) motion on the grounds that the record showed a "clear case of flagrant bad faith on the plaintiff's part." (R150). The judge stated incorrectly that the complaint had been filed in

February 1980 and that "more than a year later still discovery is not completed." (R149). This factual error in the procedural history of the case belies the judge's purported close scrutiny of the record. He dismissed the case without any hearing only seven months after the answer had been filed.

Ezratty filed a motion to amend findings pursuant to Rule 52(b) which was denied as untimely. The First Circuit Court of Appeals, using Rule 41(b) as the source of its authority, held that the district court had not abused its discretion when it dismissed the case, that no hearing was necessary and further held that: "We find no merit in the argument that plaintiff as a seaman is a ward of the Court, and therefore deserves special treatment." (footnote omitted) (12a).

REASONS FOR GRANTING THE WRIT

I.

There is a conflict among the circuits as to the proper standards and procedures which must precede imposition of dismissal under Rule 37(b) of the Federal Rules of Civil Procedure in order to safeguard a litigant's due process rights.

The ruling of the court of appeals poses a question as to the proper application of Rule 37(b) of the Federal Rules of Civil Procedure following this Court's decision in *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639. It is submitted that the court of appeals has sanctioned a departure by the district court from the accepted and usual course of judicial proceedings which requires the exercise of this Court's power of supervision.

While purporting to limit its review to the question of whether the district court had abused its discretion for dismissing the case

under Rule 37(b), the court of appeals in fact determined *de novo* that the attorney's conduct fell within the ambit of Rule 41(b) as well. In reliance on this Court's decision that under Rule 41(b) "when circumstances make such action appropriate a district court may dismiss a complaint for failure to prosecute even without affording notice of its intention to do so or providing an adversary hearing before acting," *Link v. Wabash Railroad Company,* 370 U.S. 626, the First Circuit has here held that no hearing was necessary prior to dismissal. The ruling, on the face of it, is in direct conflict with this Court's decision in *Societé Internationale v. Rogers,* 357 U.S. 197 wherein this Court explicitly stated that "whether a court has power to dismiss a complaint because of non-compliance with a production order depends exclusively upon Rule 37 . . . ." at p. 207.

Not only did the court of appeals erroneously rely on the *Link* decision, it failed to mention the discussion therein of Rule 60(b) as a corrective remedy for lack of notice and hearing. In *Link,* the petitioner had not availed himself of this remedy. The petitioner herein most certainly did; but his motion for reconsideration was denied — without a hearing — on the grounds that his attorneys' conduct merited the severe penalty of dismissal irrespective of any mitigating factors. The district court failed to consider lesser sanctions. The First Circuit has herein affirmed this harsh result without any consideration of the remedial purpose of Rule 60(b). *See* 7 Moore's *Federal Practice,* ¶60.22[2]. The decision is inconsistent, therefore, with this Court's traditional concern for preserving the due process rights of litigants. *Hovey v. Elliott,* 167 U.S. 409, *Hammond v. Arkansas,* 212 U.S. 322; *Societé Internationale v. Rogers, op. cit.; National Hockey League, op. cit.; Universal Oil Products Co. v. Root Refining Co.,* 326 U.S. 575.

The ruling of the court of appeals suggests that in the First Circuit, deterrence overrides due process, thus bespeaking the need

for this Court's guidance as to the proper balance between the due process rights of litigants and a district court's mandate to effect the just, speedy and inexpensive determination of every action. Rule 37 empowers the court to make such orders "as are just." The question at issue is what is it that constitutes a full consideration of the record on the issue of whether to impose dismissal as a just sanction so as to be within the permissible range of the court's discretion.

This Court has held that when the term discretion is "invoked as a guide to judicial action, it means a sound discretion, that is to say a discretion exercised not arbitrarily or willfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result." *Langnes v. Green,* 282 U.S. 531. There is a test for the exercise of discretion under Rule 37. It is that Rule 37 "should not be construed to authorize dismissal of [a] complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability and not to willfulness, bad faith, or any fault of petitioner." *Societé Internationale, op. cit.* at 212. It is submitted that where there are factual disputes, failure to hold a hearing to determine the reasons for non-compliance is an abuse of discretion. *See* Renfrew, *Discovery Sanctions,* 67 Cal. Law Rev. 1062 (1979). The First Circuit's countenance of such abuse conflicts with the express policies which govern appellate review in other circuits.

It is the policy in three circuits to examine the extent to which the petitioner, as distinguished from his counsel, was personally responsible for the non-compliance with discovery orders. *See Rogers v. Kroger Company,* 669 F.2d 317 (5th Cir. 1982) and cases cited therein; *Joplin v. Southwestern Bell Telephone Company,* 671 F.2d 1274 (10th Cir. 1982); *Butler v. Pearson,* 636 F.2d 526 (D.C. Cir. 1980).

Further, other circuits routinely examine whether the lower court had considered lesser sanctions, whether new counsel had entered the case, the extent to which the opposing party was at fault, the degree of actual prejudice to the respondent, and the length of time the case had been on the docket prior to dismissal. A decision to dismiss a case in the absence of one or more of these factors has been held to constitute an abuse of discretion by at least four circuits. *Rogers v. Kroger Company, op. cit., passim; Nealy v. Transportacion Maritima Mexicana,* 630 F.2d 694 (9th Cir. 1980); *EEOC v. Carter Carburetor,* 577 F.2d 43 (8th Cir. 1978), *cert. denied,* 439 U.S. 1081 (1979); *Schenck v. Stearns,* 583 F.2d 60 (2nd Cir. 1978).

The basis for the court of appeals' refusal herein to apply any of the aforementioned criteria to the orders of the district court has not been explained. That the ruling sanctions the "mere punishment" which so offends due process is clear: "We realize that we are visiting the sins of the attorneys upon the client, but this is an unavoidable side effect of the adversary system." *See* appendix, page 11a. This policy is radically in conflict with the decisions of other courts of appeals, suggesting that this Court's guidance as to the "permissible scope to be accorded sanctions under Rule 37 and under what circumstances sanctions should appropriately be applied" continues to be necessary.

II.

The decision below raises a serious problem with respect to the proper application of Rule 37(b) to cases involving the rights and remedies of American merchant seamen who have been, historically, wards of the court and are specially protected by federal law.

The court of appeals has said that "we find no merit in the argument that petitioner as a seaman is a ward of the court and

therefore deserves special treatment." *See* appendix, page 12a. With respect to the status of the petitioner as a ward of the court, the ruling is in direct conflict with this Court's decisions in *Harden v. Gordon,* 11 F. Cas. 480; *Garrett v. Moore-McCormack Co.,* 317 U.S. 239; *Oil, Chemical and Atomic Workers International v. Mobil Oil Co.,* 426 U.S. 407. *See as well,* Norris, *Law of Seamen,* 3rd Ed., §503 (1970).

As to the issue of whether the petitioner was deserving of "special" treatment, it is submitted that the court of appeals has herein misconstrued the nature of the wardship theory which traditionally governs the treatment of seamen. It is "beneficient" treatment to which seamen have been entitled as a matter of law, signifying, at the very least, a recognition that their problems with respect to participation in the legal system differ from those of landbased workers.

The Third Circuit cases to which the court of appeals referred are inapposite to its position. In both those cases, the appellate court affirmed dismissals under Rule 41(b) only after balancing the plaintiff's entitlement to beneficent treatment against the lower court's responsibility to secure a just, speedy and inexpensive determination of every action. *Kenney v. California Tanker Company,* 381 F.2d 775 (3rd Cir. 1969); *Torino v. Texaco, Inc.,* 378 F.2d 268 (3rd Cir. 1967). What distinguishes both these holdings from this one is that the plaintiffs, not counsel, had been to blame for the failure to prosecute. That the petitioner herein should suffer the same penalty when he has been characterized as the "victim" of his attorneys' conduct, suggests that in the First Circuit, the rights and remedies of American merchant seamen are in serious jeopardy.

Insofar as determining whether the petitioner was at fault, there was evidence to the contrary. Although on shore but once a week, he had submitted himself to a physical examination by

the respondent's doctor on three occasions without being seen. To label the doctor's failure to see the petitioner as a "discovery dereliction" on the petitioner's part is contrary to fact, suggesting that no amount of effort on the petitioner's part to comply with the orders of the district court could mitigate the alleged wrongful behavior of his counsel so as to reduce the penalty.

The effect of the ruling herein has been to deprive the petitioner of his right to a jury trial under the Jones Act, 46 U.S.C. §688. The remedial purpose of this legislation never entered the court's thinking. Consequently, the pre-eminent role of the jury in Jones Act cases was not considered by the court. *Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines,* 369 U.S. 360; *Jacobs v. New York City,* 315 U.S. 752; *Ferguson v. Moore-McCormack Lines,* 352 U.S. 521; *Braen v. Pfeiffer Oil Transport Co., Inc.,* 361 U.S. 129; *Johannssen v. Gulf Trading & Transportation Co.,* 633 F.2d 653 (2nd Cir. 1980). It is submitted that the court of appeals' refusal to consider the petitioner's status as a ward of the court is contrary to his rights as a matter of law.

CONCLUSION

In view of these considerations, the petitioner respectfully submits that this petition be granted.

Respectfully submitted,

BERNARD ROLNICK
Attorney for Petitioner
Counsel of Record

PETER J. DEAN
JANE ROLNICK GOLDBERG
Of Counsel

APPENDIX

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED FEBRUARY 1, 1982

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 81-1183.
81-1204.
81-1256.
81-1259.
81-1260.
81-1286.
81-1335.

JUAN CORCHADO,

Plaintiff-Appellant,

v.

PUERTO RICO MARINE MANAGEMENT, INC.,

Defendant-Appellee.

Before COFFIN, *Chief Judge*,
CAMPBELL, BOWNES and BREYER, *Circuit Judges*.

Entered: February 1, 1982

We consider this petition for rehearing in banc on the merits, which petition was delayed in the mails.

The petition for rehearing in banc is denied.

Order Dated February 1, 1982

By the Court:

DANA H. GALLUP, Clerk.

By: Beigliano
Chief Deputy Clerk.

[cc: Messrs. Ezratty, Rolnick and Brown]

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED JANUARY 15, 1982

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 81-1183.
81-1204.
81-1256.
81-1259.
81-1260.
81-1286.
81-1335.

JUAN CORCHADO,

Plaintiff-Appellant,

v.

PUERTO RICO MARINE MANAGEMENT, INC.,

Defendant-Appellee.

Before CAMPBELL, BOWNES and
BREYER, *Circuit Judges.*

Entered: January 15, 1982

It is ordered that the petition for rehearing filed in these cases on January 12, 1982 be, and the same hereby is, denied.

By the Court:

s/ DANA H. GALLUP
Clerk.

[cc: Messrs. Ezratty and Brown]

OPINION OF UNITED STATES COURT OF APPEALS FOR FIRST CIRCUIT DATED DECEMBER 8, 1981

UNITED STATES COURT OF APPEALS,
FIRST CIRCUIT

Argued Nov. 2, 1981.

Decided Dec. 8, 1981.

Rehearing Denied Jan. 15, 1982

Nos. 81-1183, 81-1204, 81-1256, 81-1259, 81-1260, 81-1286 and 81-1335

JUAN CORCHADO,

Plaintiff-Appellant,

v.

PUERTO RICO MARINE MANAGEMENT, INC.,

Defendant-Appellee.

Harry A. Ezratty, San Juan, P.R., for appellant.

Herbert W. Brown, III, San Juan, P.R., with whom Law Offices of Jimenez & Fuste, San Juan, P.R., was on brief, for appellee.

Before CAMPELL, BOWNES, and BREYER, Circuit Judges

BOWNES, Circuit Judge.

Opinion

The issue on appeal is whether the district court abused its discretion in dismissing this case for failure to comply with discovery orders and failure of plaintiff's counsel to attend a pretrial conference. We affirm the dismissal.

Plaintiff-Appellant, Juan Corchado, is a merchant seaman who allegedly incurred two knee injuries while aboard one of defendant-appellee's vessels, the SS Fortaleza. Corchado retained Attorney Bernard Rolnick, a New York lawyer, to represent him. Rolnick referred the case to Wilfredo Geigel, a Puerto Rican attorney who brought a complaint which was filed in the District Court of Puerto Rico on March 31, 1980.[1] Summons was issued on the same day, but service of process was not made until June 22, 1980.[2] A timely answer was filed on July 7, 1980, and, at the same time, interrogatories, a request for production of documents and a notice of the taking of plaintiff's deposition on August 5, 1980, were sent to Attorney Geigel. The date of the deposition was changed by agreement of counsel to August 13, 1980. When the plaintiff arrived for his deposition, he was accompanied not only by Attorney Geigel, but also by another attorney, Harry Ezratty. Ezratty stated at the outset of the deposition: "Let me, at this time, for the record, state that I am co-counsel with Wilfredo Geigel. I have not filed a formal appearance but I will be filing one shortly. But, for the record, I am co-counsel."

In plaintiff's brief, which is signed only by Ezratty,[3] he

1. The complaint is dated February 29, 1980.

2. No reason is given for the delay in service of process.

3. There are three separate notices of appeal: one filed and signed by Attorney Ezratty, one filed by Attorneys Rolnick and Rodriguez Masso and signed by Rodriguez, and one filed and signed by Rolnick.

describes his role in the case as follows:

> Sometime thereafter [after suit was filed by Attorney Geigel], CORCHADO contacted Harry A. Ezratty, also of the Puerto Rico bar requesting that Ezratty assume representation of the case. CORCHADO said he would dismiss both Geigel and Rolnick as counsel. Since Ezratty had at one time been Rolnick's partner and had been closely associated with Geigel, he declined. Some months later, on CORCHADO's insistence, Ezratty agreed with Rolnick and Geigel to serve, without fee and merely as a consultant, to handle the technical aspects of the case involving ship's maneuvers and medical damages. In this connection, Ezratty obtained the services of an expert in ship's handling and presented CORCHADO to a physician who would act for the plaintiff as an expert Orthopod.
>
> Part of the agreement made between counsel was that Ezratty would not try the case and he would be notified of all matters in the case by Geigel. Copies of all documents would be sent to him so that he would be made aware of the proceedings in the case. Unfortunately, this was not done in all instances. While Ezratty was notified of CORCHADO's deposition and did in fact attend and worked on several interrogatories and discovery documents with Geigel, Ezratty was not notified of due dates of answers to interrogatories, pretrial conferences, the trial date and a deposition Geigel took of CORCHADO's shipmate who was present at one accident.

Opinion

At CORCHADO's deposition, Ezratty stated he was "co-counsel", he did not however at any time file a Notice of Appearance with the District Court; Ezratty did not receive any notices from the District Court as to any of the dates or deadlines or the setting of any conferences. Ezratty performed no other work than act as consultant, until he prepared a set of interrogatories, immediately prior to dismissal of this case. Geigel did not place Ezratty's name on any pleadings or motions, nor was he authorized to do so.

During the month of December, Ezratty discovered that Geigel was leaving Puerto Rico on holiday. Ezratty volunteered to prepare and file answers to defendant's interrogatories. At that time Ezratty was not notified by Geigel that CORCHADO was under Court order to file interrogatories by a certain date. Ignorant of this fact, Ezratty prepared the interrogatories and while doing so was informed by PRMMI's counsel of the Court's order. It was already passed [sic] the deadline. Ezratty filed the answers to interrogatories as quickly as possible. PRMMI's counsel knew they had been prepared and that Ezratty would personally deliver them, since Ezratty's office is engaged in a great deal of litigation with defendant's counsel and would be in his office on other matters. Ezratty was also informed of the pretrial conference by PRMMI's counsel.

In the interim, Ezratty attempted to contact Geigel on his return to Puerto Rico to discuss the

pre-trial order and its contents. He was never able to get Geigel at his office. Although Ezratty left many messages, Geigel never returned the calls.

On the eve of the pre-trial, knowing that no pre-trial order had ever been prepared, (this knowledge was received from counsel for PRMMI), Ezratty called Rolnick directly in New York, since Geigel remained unavailable. Rolnick then agreed that new counsel should enter the case especially since Mr. CORCHADO was pressuring both Rolnick and Ezratty for this. The next day, Geigel appeared at the pretrial conference alone and notified the Magistrate of this. Geigel did not know that interrogatories had already been prepared and were ready.

What ever the reasons for Ezratty's half-in, half-out appearance in this case, it is clear that from the date of plaintiff's deposition there was not only a lack of communications between him and Geigel, but that neither of them assumed the responsibility for responding to discovery requests and orders.

There was a status conference before the magistrate on November 20, 1980, attended by Geigel and the attorney for the defendant at which a discovery schedule was set and a pretrial conference scheduled for January 23, 1981. An order of the court affirming the date of the pretrial conference and specifying what would be required at the conference was issued on November 25, 1980. A pretrial order form was sent to the attorneys with instructions that it be completed and filed seven days prior to the conference. Plaintiff's attorneys failed to comply with the order in any respect.

Opinion

We can understand plaintiff's claim that the failure to be examined by defendant's doctor was not his fault because he appeared three times at the doctor's office but was told that the doctor was too busy to examine him each time. If that were the only discovery dereliction, we would be constrained to be charitable, but it is the only one for which plaintiff offers any kind of reasonable excuse.

On December 15, 1980, the court ordered a status conference before Judge Gierbolini on February 11, 1981, and a trial date of February 17 was fixed. In response to defendant's motion of December 8, 1980, to compel answers to interrogatories and for sanctions, the magistrate on December 15 1980, ordered: "The outstanding discovery shall be answered by December 17, 1980, or sanctions may follow." Plaintiff failed to respond. On December 23, 1980, defendant moved again for sanctions. This motion states that defendant's attorney telephoned plaintiff's counsel on December 18 and was assured that there would be a discovery response by December 22, 1980. Attorney Geigel responded to this motion on December 29 by asking for an additional fifteen days to answer the interrogatories. The answers, however, were not filed within the fifteen-day period. On January 23, 1981, Attorney Geigel appeared at the pretrial conference before the magistrate and filed a motion to withdraw as plaintiff's counsel, giving as the reason that plaintiff had requested him to do so. Attorney Ezratty did not appear at the pretrial conference, although it is clear from his statement in plaintiff's brief that he was informed of it and knew that Geigel's only purpose in attending was to ask to withdraw as plaintiff's counsel. In granting the motion on January 26, the magistrate noted: "The record reflects plaintiff will remain represented by co-counsel Harry Ezratty. See his appearance at plaintiff's deposition of 8—13—80."

Opinion

On January 26, 1981, defendant filed another motion for sanctions. On the same date, the magistrate issued a pretrial conference memorandum and a recommendation that plaintiff's complaint be dismissed. The memorandun recited plaintiff's failure to meet discovery orders. It also noted that counsel for defendant stated that he had on several occasions attempted to meet with Attorney Ezratty and to have Ezratty appear at the pretrial conference of January 23.

On February 2, Geigel, although no longer counsel in the case, filed an attempted explanation of why the discovery schedule was not met, the essence of which is a failure of communications between himself and Ezratty. On February 11, 1981, the district court, after reciting the sorry history of the case, dismissed the complaint. The court denied the plaintiff's motion for reconsideration on April 13, 1981. Part of its order bears repeating:

> A close scrutiny of the full record of this case shows a clear case of flagrant bad faith on the part of plaintiff that has unnecessarily delayed these proceedings. These dilatory tactics by two attorneys retained by plaintiff, as stated in our Order of February 11, 1981, cannot be approved since they show a pattern of reprehensible conduct that merits the harsh penalty of dismissal. The deterrent effect of this discretionary action on attorneys in a district with traditional and chronic procrastination, cannot be overlooked.

[1] The conduct of the plaintiff's attorneys in this case brings it within the ambit both Federal Rule of Civil Procedure (b)(2)(C) (dismissal for failure to respond discovery) and Federal Rule of Civil Procedure 41(b) (dismissal for failure to prosecute). The

standard or review is the same or both, abuse of discretion. *Link v. Walsh Railroad Co.*, 370 U.S. 626, 82 S.Ct. 86, 8 L.Ed.2d 734 (1962) (Rule 41(b) dismissal); *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1976) (dismissal under Fed.R.Civ.P. 37(b)(2)(C).

[2,3] We find no abuse of discretion. The district court was faced not only with a persistent failure to respond to discovery, but with the anomalous situation of the plaintiff's attorney coming to a pretrial conference without the counsel who was to replace him for the sole purpose of withdrawing from the case, and this, after a trial date had been set. We hope that we have made it clear by now that a district court's discretion to use the extreme sanction of dismissal for failure of counsel to respond properly to discovery orders or to fail to appear at scheduled conferences or hearings will be upheld unless abused. *See Zavala Santiago v. Gonzalez Rivera*, 553 F.2d 710 (1st Cir. 1977); *Pease v. Peters*, 550 F.2d 698 (1st Cir. 1977); *Affanato v. Merrill Brothers*, 547 F.2d 138 (1st Cir. 1977); *Local Union No. 251 v. Town Line Sand & Gravel, Inc.*, 511 F.2d 1198 (1st Cir. 1975).

We realize that we are visiting the sins of the attorneys upon the client, but this is an unavoidable side effect of the adversary system. We must note in this connection that however good the intentions of Attorney Ezratty were, the plaintiff was the victim of Ezratty's decision to play only a selective role in the case. Nor can we understand Attorney Geigel's last minute withdrawal without making sure that Attorney Ezratty took over the case and was brought up to date on all aspects of it.

[4] Plaintiff has argued that a hearing should have been held before the sanction of dismissal was imposed. In *Link v. Wabash Railroad Co.*, 370 U.S. at 633, 82 S.Ct. at 1390, the Supreme Court explicitly held:

> Accordingly, when circumstances make such action appropriate, a District Court may dismiss a complaint for failure to prosecute even without affording notice of its intention to do so or providing an adversary hearing before acting. Whether such an order can stand on appeal depends not on power but on whether it was within the permissible range of the court's discretion.

(footnote omitted). Under the circumstances of this case, no hearing was necessary.

We find no merit in the argument that plaintiff as a seaman is a ward of the court and, therefore, deserves special treatment.[4]

Affirmed.

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4. Plaintiff cites two cases in support of his contention, neither of which is apposite to his argument and both of which lend weight to our holding in this case. In *Kenney v. California Tanker Co.*, 381 F.2d 775 (3d Cir. 1967), the court upheld a dismissal of a libel in admiralty for libelant's failure to take any action in the case for one year. In *Torino v. Texaco, Inc.*, 378 F.2d 268 (3d Cir. 1967), the court affirmed the dismissal of a seaman's action for failure of plaintiff to appear at trial.

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO DATED APRIL 13, 1981

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

CIVIL NO. 80-694

JUAN CORCHADO

Plaintiff

v.

PUERTO RICO MARINE MANAGEMENT, INC.

Defendant

ORDER DENYING RECONSIDERATION

Plaintiff has filed a motion requesting reconsideration of our Order of February 11, 1981 dismissing this case for failure to comply with the Orders of this Court, failure to effectuate discovery as ordered and for the use of dilatory tactics.

For the past year we have been struggling to move cases in our crowded docket in a smooth and expeditious manner. This has been no easy task, mainly because in this endeavor we have been confronted, hampered and hindered with the engrained resistance of attorneys who feel that in civil contentious cases they need and are entitled to two or three years in order to bring a case to trial.

A substantial number of motions, orders and hearings are commonly needed to compel completion of discovery. Warning

of sanctions and even the threat of holding the attorneys in contempt of Court are frequently needed to compel attorneys to appear at hearings before the Magistrate and before the Court. The result of all this is unnecessary and intolerable delays, waste of energy and resources, higher expenses for litigants and congestion of the dockets.

Originally, the complaint in this case was filed in February, 1080 and more than a year later still discovery is not completed.

A close scrutiny of the full record of this case shows a clear case of flagrant bad faith on the part of plaintiff that has unnecessarily delayed these proceedings. These dilatory tactics by two attorneys retained by plaintiff, as stated in our Order of February 11, 1981, cannot be approved since they show a pattern of reprehensible conduct that merits the harsh penalty of dismissal. The deterrent effect of this discretionary action on attorneys in a district with traditional and chronic procrastination, cannot be overlooked.

In a situation similar to this one the Supreme Court in *National Hockey League v. Metropolitan Hockey League, Inc.*, 427 U.S. 639 (1976), established the following doctrine:

> "But here, as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the District Court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction but to deter those who might be tempted to such conduct in the absence of such a deterrent . . . [I]t might well be that these respondents would faithfully comply with all future discovery orders entered by the District Court in

> this case. But other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other District Courts. Under the circumstances of this case, we hold that the district judge did not abuse his discretion in finding bad faith on the part of these respondents, and concluding that the extreme sanction of dismissal was appropriate in this case by reason of respondents' "flagrant bad faith" and their counsel's "callous disregard" of their responsibilities."

Finally, we note that Wilfredo Geigel, Esq., a former counsel for plaintiff who resigned from the case pursuant to his motion of January 23, 1981, which was granted by the Magistrate on January 26, 1981, has also filed a Motion on behalf of plaintiff without first requesting the leave of Court. This action by Mr. Geigel is highly improper, especially in view of the motion by plaintiff's present attorney Harry Ezratty, Esq., who specifically requested from us in his motion for reconsideration that we order Mr. Geigel to withdraw as counsel for plaintiff.

In view of the above, the Motion of Wilfredo Geigel, Esq. is not considered, is expunged from the record and the Clerk is ordered to return it to Mr. Geigel. The motion for reconsideration of Harry Ezratty, Esq. is hereby DENIED.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 13th day of April, 1981.

s/ Gilberto Gierbolini
United States District Judge

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO DATED FEBRUARY 11, 1981

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

JUAN CORCHADO

Plaintiff

v.

PUERTO RICO MARINE MANAGEMENT, INC.

Defendant

This case is before us on the Magistrate's Report and Recommendation of January 26, 1981 recommending the dismissal of the present action for plaintiff's failure to provide discovery.

From the record it appears that the complaint was filed on March 31, 1980. On July 8, 1980, notice was given by defendant that it had submitted to plaintiff interrogatories, supplementary interrogatories, supplementary interrogatories on the issues of unseaworthiness and negligence and a request for production of documents.

Thereafter, on November 28 defendant submitted an *ex-parte* proposed time-table informing this Court of plaintiff's failure to respond to any of the discovery requests. At the status conference on November 20, 1980 the parties were granted until January 16, 1981 to complete discovery and plaintiff was ordered to answer all outstanding discovery demands by no later than December 1st.

Order Dated February 11, 1981

On December 10, 1980 plaintiff filed a motion informing the Court that he would need an additional week after December 1st to answer the outstanding discovery. In a footnote Order dated December 15, 1980 on this same motion, the Magistrate ordered that plaintiff answer the outstanding discovery by December 17, 1980 or that sanctions would follow.

On December 8, 1980 defendant filed a motion to compel answers to interrogatories requesting that the Court impose sanctions. The same was denied. Thereafter, on December 23, 1980 defendant filed a motion for sanctions in view of plaintiff's failure to comply with this Court's order that the outstanding discovery be answered by December 17, 1980. This motion was also denied.

On December 31, 1980 plaintiff filed an opposition to motion for sanctions requesting an additional fifteen (15) days to file the answers to the interrogatories. The Magistrate by Order of January 8, 1981 granted said extension as last extension and ordered that the answers be filed by January 16, 1981.

On January 23, 1981 attorney for plaintiff, Wilfredo A. Geigel, filed a motion for withdrawal of counsel. The same was granted by the Magistrate's Order of January 26, 1981 based on the facts that the record reflected that plaintiff would remain represented by co-counsel Harry Ezratty. A pretrial conference was held on January 26, 1981. The parties appeared represented by Wilfredo Geigel, co-counsel for plaintiff, and by Herbert W. Brown, counsel for defendant. Counsel Harry Ezratty failed to appear, even though (according to Mr. Geigel), Mr. Ezratty was aware of co-counsel's motion for withdrawal of representation. At the date of the Pretrial Conference, plaintiff still had not answered the outstanding discovery, therefore impeding

defendant's preparation for the Pretrial Conference and causing the abortion of said conference. It was not until January 27 that the answers to interrogatories were finally provided.

On this same date, a Status Conference w: s held before the undersigned. Mr. Brown appeared for defendant, but no counsel appeared for plaintiff.

After reviewing the record of the case, and noting the history of non-compliance with the Orders of this Court, we adopt as our own the Magistrate's recommendation and hereby dismiss this case.

These dilatory tactics cannot be approved and since they show a pattern of conduct, the necessary sanctions can be imposed for failure to comply with the Orders of this Court. *Link v. Wabash Railroad Company,* 370 U.S. 626 (1961); *Zabala Santiago v. Gonzalez Rivera,* 553 F. 2d 710 (1st Cir. 1977).

The Clerk shall enter judgment accordingly.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 11th day of February, 1981.

s/ Gilberto Gierbolini
United States District Judge

MAGISTRATE'S REPORT OF RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO DATED JANUARY 26, 1981

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

Civil No. 80-0694

JUAN CORCHADO

Plaintiff

v.

PUERTO RICO MARINE MANAGEMENT, INC.

Defendant

PRETRIAL CONFERENCE MEMORANDUM AND MAGISTRATE REPORT AND RECOMMENDATION TO HONORABLE GILBERTO GIERBOLINI

At today's Conference the parties appeared represented by Wilfredo Geigel, co-counsel for plaintiff, and by Herbert W. Brown, counsel for defendant. Counsel Harry Ezratty failed to appear.[1]

Counsel failed to appear with the necessary Pretrial Order. Co-counsel for plaintiff today filed a motion for withdrawal as counsel. He indicated that co-counsel Ezratty is aware of the

1. At the taking of plaintiff's deposition on August 13, 1980 Attorney Harry Ezratty entered on appearance as co-counsel for plaintiff. See transcript of "Deposition of Juan Corchado" filed on November 18, 1980.

motion. Counsel for defendant manifested that he on several occasions has attempted to meet with counsel Ezratty and to have Attorney Ezratty appear at today's Pretrial Conference.

Because the case is set for trial on February 17, 1981, before Your Honor; because defendant has been, allegedly, unable to complete discovery due to plaintiff's conduct; because defendant's co-counsel has failed to appear today, although he is aware that counsel Wilfredo Geigel was to appear with a motion to withdraw as counsel; and for the reasons expressed in defendant's motion of January 13, 1981, defendant today requested this case dismissed as a sanction for plaintiff's refusal to provide discovery, or that the trial set for February 17, 1981, and the Status Conference set before Your Honor for February 11, 1981, be continued and defendant be granted more time to complete discovery.

It appearing to this Magistrate that the Court has been more than generous to plaintiff in accommodating him to the discovery demands of the case, and it appearing that plaintiff was granted until December 17, 1980 to provide the answers to defendant's discovery demands of June 1980 and advised that otherwise sanctions will follow;[2] and it appearing that plaintiff has failed to provide the answers to the outstanding discovery; has impeded defendant's preparation for a Pretrial Conference and for trial; and has caused the abortion of today's Pretrial Conference, it is hereby RECOMMENDED that plaintiff's complaint be dismissed as sanctions.

Plaintiff is to file his objections to this Report and Recommendation by not later than February 5, 1981.

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2. By order of January 8, 1981, the time to file the answers was extended to January 16, 1981.

IT IS SO RECOMMENDED.

At San Juan, Puerto Rico, this 26th day of January 1981.

s/ DENNIS A. SIMONPIETRI-MONEFELDT
UNITED STATES MAGISTRATE

GEIGEL'S MOTION FOR RECONSIDERATION DATED MARCH 3, 1981

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

Civil Action No. 80-694

JUAN CORCHADO,

Plaintiff,

v.

PUERTO RICO MARINE MANAGEMENT INC.,

Defendant.

MOTION FOR RECONSIDERATION AND 60(b) FRCP

TO THE HONORABLE COURT:

This Motion is filed on behalf of Plaintiff, although the undersigned was relieved of his representation. As an officer of the Court, the undersigned owes an obligation to not only to the Plaintiff, but to the Court. In view of the Order and Judgment entered by this Court and of the Motion filed by Mr. Harry Ezratty, I feel compelled to make this appearance.

I agree and include by reference the statements of Mr. Ezratty's Motion as to: 1) Plaintiff's injury, 2) a seaman being a ward of the Court and, 3) the effect of Rule 60(b).

The statements to be made herein are been without the benefit of the office file in this case which was delivered to Mr. Ezratty

when I was instructed to withdraw from the case. Although the case was originally retained by Mr. Rolnick, it was done in my office, to the knowledge of Mr. Corchado that I would represent him as I had done before in another action.

The case took its course and defendant submitted various discovery mechanisms. Mr. Corchado was notified of the deposition and the set of factual interrogatories were sent to him with pertinent instructions. Plaintiff appeared for his deposition. This took place on a Wednesday in August which was the only day available because Mr. Corchado was sailing. On that occassion Mr. Ezratty announced for the record that he was appearing for plaintiff although he never made a formal appearance.

On various occasions we notififed Mr. Corchado that interrogatories had to be answered. Not much haste was put in the need of the answers, because Defendant had most of the pertinent information regarding Plaintiff. This it had obtained through a similar interrogatories on a previous case and also through two depositions. One in the previous case and one in the present. Notwithstanding when the motions were filed by Defendant and instructions or orders were entered various motions and oppositions were filed on behalf of Plaintiff. The basic difficulty in this case was one of communication. Although Plaintiff was notified on various occassions as to the need for his comming to our office, he seldom did. Mr. Corchado was sailing most of the time and while in port his time was limited. We assume that was the reason he could not come in. During the months of November and December, we were under the impression that Mr. Corchado was unable to reach our office because he tried to comply with Defendant's request for a physical examination. In at least three different dates he supposedly went to Bayamon for the appointment, waited for the Doctor but was no examined.

Geigel's Motion

Prior to my departure for Europe at the end of December, Mr. Ezratty and I spoke. I informed him that the interrogatories were pending, I may or may not informed him about the due date, he stated that Mr. Corchado was going to see him and the interrogatories would be answered and sent to me for review prior to delivery to Defendant. At that time I informed him not to wait for me because I was going to be in Europe, therefore Mr. Corchado should have subscribed them and have them notarized without my participation at the time.

At the time I appeared before Magistrate Simonpietri, I assumed Mr. Corchado had signed the interrogatories and these had been delivered to Defendant while I was away, I did not know it had not be done, nor why not. Prior to that appearance I had called the Magistrate's office to informed him that I had been requested to withdraw from the case. I filed my Motion and requested that Plaintiff be given time to retain new Counsel. Although most probably Mr. Ezratty would become his attorney of record the request was made to assure that Mr. Corchado would not be prejudiced.

At the time of the meeting in the Magistrate's office I was not made aware by Mr. Brown that he had spoken to Mr. Ezratty and Mr. Ezratty had promised that the answer to interrogatories were forthcoming.

One thing I can state for the record is that there has never been an intention to use dilatory tactics as presumed by the Order. There has been a failure of communication which should not be sanctioned. Plaintiff should be given the opportunity to put his case before the jury. Defendant has not been prejudiced. It received the answer to interrogatories prior to the Order of this Court; as a matter of fact, prior to the recommendations be issued by the Magistrate.

Geigel's Motion

There has been no willfulness in the failure to prompty answer interrogatories. An evidentiary hearing should be had to corroborate this fact. In the case of *Flaks v. Koegel,* 505 F2d 702 the Court recognized the need of such hearing, having determined that the District Court abused its discretion in failing to conduct an evidentiary hearing prior to imposition of sanctions. That same case held that a Magistrate's report standing alone, did not support a finding of any deliberetae refusal to justify the sanctions imposed. In *Roberts v. Norden,* 76 FRD 75 the Court also found that it must look into the parties willfulness or good faith prior to sanctioning non compliance with discovery. The dismissal of the complaint constitutes "the most severe in the spectrum of sanctions provided by statute or rule available to the District Court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those might be tempted to such conduct in the absence of such a deterrent . . . sanctions of dismissal was appropriate in this case by reason of respondent's 'flagrant bad faith' and their Counsel's callous disregard' of their responsibilities". *Nat. Hockey League v. Metro Hockey Club,* 427 US 639, 49 LEd 2d 747, 751. We believe this case does not fall within the scope of said activities.

It is very respectfully requested that a hearing be held and that the Order and Judgment be vacated and Plaintiff granted a final opportunity to comply with any pending pretrial responsibility and to bring his case before the jury.

In San Juan, Puerto Rico, this 3 day of March, 1981.

I CERTIFY: That on this same date I have sent copy of the foregoing Motion, by regular mail, to Herbert W. Brown III,

DOCKET ENTRIES OF THE UNITED STATES DISTRICT COURT, DISTRICT OF PUERTO RICO

CORCHADO, JUAN

Plaintiff

vs

PUERTO RICO MARINE MANAGEMENT, INC.

Defendant

CAUSE

46:688 - Jones Act — Admiralty — Damages, personal injuries to Plff. has been sent to secure cargo upon adverse and dangerous conditions, etc.

ATTORNEYS

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Date	NR	Proceedings
3-31-80	1	Complaint, fld.

Docket Entries

Date	NR	Proceedings
3-31-80	1	Summons and s/c issued to U.S. Marshal w. complt.
5-16-80	2	Case set for July 31/80 at 9:30 AM for some disp. before Mag. Diaz (Clerk) s/c Geigel.
7-8-80	3	Deft.'s notice of taking of deposition of plff., fld.
7-8-80	4	Deft.'s notice that it has submitted to plff. interrog., and req. for prod. of docs. fld.
7-8-80	5	ANSWER, fld.
7-10-80	6	S/C order that parties appear before Mag. Diaz on 9-24-80 at 10 AM fld. and entered (Clerk) s/c Brown, Geigel.
7-23-80	7	Summons ret'd. and fld. exec. thru José Angel Robles on 6-22-80, fld.
8-11-80	8	Plff.'s req. for prod. of docs., fld.
8-29-80	9	Deft.'s answer to request for production of docs., filed w. attachments.
9-8-80	10	Order resetting s/c for 11-20-80 at 10:30 AM before Mag. D. Simonpietri fld. and entered. (Clerk) s/c Brown, Geigel.
9-24-80	11	Deft.'s notice of physical exam. of plff., fld.
10-6-80	12	Deft.'s notice of physical exam. of plff., fld.

Docket Entries

Date	NR	Proceedings
11-18-80	13	Deft.'s mot. to compel discovery etc., fld.
11-18-80	14	Deposition of Juan Corchado w. notice of filing thereof, fld.
11-25-80	15	S/C memo dtd. 11-20-80 that at conf. held counsel were grtd. until 1-16-81 to complete discovery etc. Clerk is to set p.t. on 1-23-81 at 2 PM and to refer the case to J. Gierbolini for trial setting., fld. and ent'd. (Mag. Simonpietri) s/c Brown, Geigel.
11-25-80	16	Proposed timetable fld. and approved as am. at the conf. (Mag. Simonpietri) s/c Brown, Geigel.
11-25-80	17	Order setting p.t. conf. fld. and ent'd. (Clerk) s/c Brown, Geigel.
11-25-80	17A	Plff.'s opp. to mot. to compell, fld.
12-1-80	18	Notice of deft. of physical exam., of plff., fld.
12-8-80	19	Deft.'s mot. to compel answers to interrogatories, fld.
12-10-80	20	Plff.'s informative mot. that the outstanding discovery will probably take an add. week after 12-1, etc. fld.
12-15-80	21	ORDER setting S/C on 2-11-81 at 9:30 AM before J. Gierbolini; that any other conf. which may have already been set before a Mag. will also be held; that p.t. mem. to be fld. prior to this conf.; that

Docket Entries

Date	NR	Proceedings
		trial is set for 2-17-81 at 9:30 AM, fld. and entered. (Clerk) s/c Brown, Geigel.
12-16-80	—	ORDER on Mot. #19: DENIED. (Mag. Simonpietri) s/c Brown, Geigel.
12-16-80	—	ORDER on Mot. #20: NOTED. The outstanding discovery is to be answered by Dec. 17 or sanctions follow. (Mag. Simonpietri) s/c Brown, Geigel.
12-23-80	22	Deft.'s mot. for sanctions, filed.
12-31-80	23	Plff.'s opp. to mot. for sanctions, fld. 1-8-80 ORDER. GRANTED as last ext. The answers are to be filed by 1-16-81 (Mag. Simonpietri) s/c Brown, Geigel.
1-8-81	—	ORDER on Mot. No. 22: DENIED. (Mag. Simonpietri) s/c
1-12-81	24	ORDER directing counsel herein to meet, ans. and file the questionnaire attached hereto within the next 20 days, re: status pf case, etc. fld. and entered. (J. Gierbolini) s/c to Jimenez & Fuste and Geigel.
1-13-81	25	Deft.'s response to opp. to mot. for sanctions and for other relief, filed.
1-23-81	25A	Mot. of Atty. Geigel to w/d, fld.
1-26-81	26	Deft.'s mot. pur. to R. 37, fld.

Docket Entries

Date	NR	Proceedings
1-28-81	—	ORDER on Mot. No. 25A: Grtd. as to the appearing atty. The record reflects plff. will remain represented by co-counsel H. Ezratty. See his appearance at plff.'s dep. 8-11-80 (Mag. Simonpietri) s/c Geigel, Corchado, Ezratty.
1-28-81	27	P.T. conf. memo and Mag. report to Hon. J. Gierbolini, recommending plff.'s complt. be dismissed as sanctions; that plff. is to file his obj. to this report by not later that 2-5-81, fld. and ent'd. (Mag. Simonpietri) s/c Corchado, Ezratty, Geigel and Brown.
2-2-81	28	Plff.'s mot. req. reconsider to P.T. conf., memo, fld.
2-5-81	29	Deft.'s opp. to request for reconsider, fld.
2-11-81	30	Case called for s/c, statement of atty. for deft. heard. Due to plff.'s disregard to Court's order, failure to comply with discovery and failure to appear for s/c set for today, an order dismissing the case will be entered. (J. Gierbolini).
2-17-81	31	Order dtd. 2-11-81 and entered 2-19-81, that Mag.'s recommendation to dism. this case is adopted by the Court; the Clerk to enter judmt. accordingly, filed. (J. Gierbolini) s/cs: H.W. Brown III, H.A. Ezratty & W. Geigel.
2-23-81	32	Judgment, entered 2-24-81, dismissing this case, filed and entered. (Clerk) s/cs H. Brown, W. Geigel and Ezratty.

Docket Entries

Date	NR	Proceedings
2-25-81	33	Plff.'s omnibus memo-mot. for reconsideration under Rule 60(b), filed.
3-3-81	34	Defts.' opp. to above omnibus mot., filed.
3-13-81	35	Deft.'s response to mot. for reconsideration, etc., filed.
3-18-81	36	Plff.'s notice of appeal, filed. s/c App. Clerk, Clerk, Transcript order given to messenger on 3-18-81, 3-31-81 Jimenez & Fuste, B. Rolnick, W. Geigel.
3-19-81	37	Plff.'s notice of appeal from final jdmt., filed and entered. s/c Clerk, Appeal's Clerk. 3-23-81 s/c B. Rodriguez Msso, HW Brown, H. Ezratty and W. Geigel.
3-25-81	38	Plff's notice of appeal from Order of Dismissal of 2-17-81, etc., filed 3-31-81 s/c Jimenez & Fuste, H. Ezratty, W. Geigel; Clerk, A. Clerk, Trans. ord. sent to Aty.
3-27-81	39	~~Plff's mot. for reconsideration and 60(b) FRCP, fld.~~ Expunged from record as atty. per J. Gierbolini's order of 4-13-81 & returned to Mr. Geigel.
4-2-81	40	Transcript order that atty. states transcript if unnecessary for appeal purposes, filed.
4-3-81	41	Plff.'s statement pursuant to 28 U.S.C. 1916, fld.

Docket Entries

Date	NR	Proceedings
4-3-81	42	Notice of Appeal from failure or refusal to reconsider order of 2-23-81, fld. s/c Clerk, Appeal's Clerk, Jimenez & Fuste & Harry Ezratty. Transcript order given to messenger on 4-3-81.
4-8-81	—	Order at margin of mot. #33: Denied. (J. Gierbolini) s/c: W. Geigel, H. Brown, H. Ezratty, Bernard Rolnick & Juan Corchado.
4-8-81	—	~~Order at margin of mot. #39: Denied. (J. Gierbolini) s/c W. Geigel, H. Brown, H. Ezratty, Bernard Rolnick & Juan Corchado.~~ Expunged from record as per J. Gierbolini's order of 4-13-81 & returned to Mr. Geigel.
4-15-81	43	Plff.'s notice of appeal w. statement pursuant to 28 U.S.C. 1916, fld. s/c: Clerk Appeals Clerk, Jimenez & Fuste & H. Ezratty. Transcript order sent by mail.
4-15-81	44	Order dtd. 4-13-81 that the mot. of Wilfredo Geigel, Esq. is not considered, is expunged from the record and the Clerk is ordered to return it to Mr. Geigel and further mot. for reconsideration of Harry Ezratty, is hereby denied, fld. and entered. (J. Gierbolini) s/c: Harry Ezratty, Jimenez & Fuste, W. Geigel on 4-16-81.
4-21-81	45	Transcript order returned as unnecessary for appeal purposes, fld.
4-22-81	—	Record on appeal mailed to C.C.A. on 4-22-81.

Docket Entries

Date	NR	Proceedings
4-27-81	45A	Plff.'s mot. to amend findings pursuant to Rule 52(b) F.R.C.P., fld.
4-30-81	46	Plff.'s supplement to mot. pursuant to Rule 52(b) F.R.C.P., fld.
4-30-81	47	Deft.'s oppositions to plff.'s mot. to amend findings pursuant to Rule 52(b) F.R.C.P., fld.
5-11-81	48	Plff.'s notice of appeal from denial of mot. for reconsideration, filed, with statement pursuant to 28 U.S.C. 1916 attached, filed. s/cs Appeal Clerk and Clerk on 5-11-81 Transcript order sent by mail. 5-19-81 Ezratty & Jimenez & Fuste.
5-18-81	49	Order denying mot. to amend findings, etc., fld. and entered. (J. Gierbolini) s/c W. Geigel, H. Ezratty & Jimenez & Fuste.

Attest: A True Copy
RAMON A. ALFARO
Clerk, U.S. District Court
by: Z. Causquillo
6/3/81

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

46 U.S.C. §688. Recovery for injury to or death of seaman

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall

be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

28 U.S.C. §636. Jurisdiction and powers

(b)(1) Notwithstanding any provision of law to the contrary—

(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate to conduct the hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for

posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions."

Federal Rules of Civil Procedure

Rule 37 (b)

(b) *Failure To Comply With Order.*

(1) *Sanctions by Court in District Where Deposition Is Taken.* If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) *Sanctions by Court in Which Action Is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under rule 30(b) (6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any

orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35 (a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B) and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Rule 41—Dismissal of Actions

(b) *Involuntary Dismissal: Effect Thereof.* For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried in the court without a jury, has completed the presentation of the evidence, the defendant without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may

then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all evidence. If the court renders the judgment on the merits against the plaintiff, the court shall make findings as provided by Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

Rule 60—Relief From Judgment or Order

(b) *Mistake; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.* On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the

judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., §1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

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No. 81-2108

In the Supreme Court of the United States

OCTOBER TERM, 1981

JUAN CORCHADO,
PETITIONER,

v.

PUERTO RICO MARINE MANAGEMENT, INC.,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

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PUERTO RICO MARINE MANAGEMENT, INC.,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

Statement of the Case

Preliminary Statement

This is a case of discovery abuse and failure to prosecute which resulted in the dismissal of the action by the District Court. The petitioner, notwithstanding multiple orders from the Court, failed to answer interrogatories and failed to provide other discovery. A host of dilatory tactics were employed by the petitioner, including withdrawal of counsel, failure to appear at a pretrial conference and failure to appear at a

status conference before the trial judge. The District Court's order of dismissal was affirmed by the First Circuit Court of Appeals.

Counter-Statement of Facts

Petitioner's statement of facts is only marginally accurate, and certain omissions and inaccuracies give an unbalanced presentation of the events which led to the District Court's dismissal of the complaint. Respondent submits that the exposition of facts contained in the opinion of the Court of Appeals affirming dismissal, contains a complete and concise summary of relevant facts. The following clarifications are submitted to correct portions of the petitioner's statement of facts and to clarify certain inaccuracies:

1. At the taking of petitioner's deposition August 13, 1980, he was represented by attorney Wilfredo A. Geigel as well as by attorney Harry A. Ezratty who made the following statement for the record:

> "Mr. Ezratty: Yes.
>
> Let me, at this time, for the record, state that I am co-counsel with Wilfredo Geigel.
>
> I have not filed a formal appearance, but I will be filing one shortly.
>
> But, for the record, I am co-counsel.
>
> Mr. Brown: Okay.
>
> What other stipulation?
>
> Mr. Ezratty: That's it." (R. 71).[1]

2. At the status conference held November 20, 1980, in addition to granting the parties until January 16, 1981 to complete discovery and scheduling a pretrial conference for Jan-

[1] References are to the joint appendix to briefs filed before the Court of Appeals.

uary 23, 1981, the Court ordered plaintiff to answer all outstanding discovery by not later than December 1, 1980. (R. 72).

3. In light of petitioner's failure to provide discovery by December 1, 1980 as ordered by the Court, respondent filed on December 8, 1980 a motion to compel answers to interrogatories. Petitioner was given until December 17, 1980 to answer the outstanding discovery and was warned that sanctions might follow. (R. 85).

4. On December 23, 1980 petitioner's answers had still not been served and respondent moved for sanctions. Petitioner requested an additional term of 15 days to comply, which request was granted by the Court as a last extension and ordered that the pending discovery was to be answered by January 16, 1981. (R. 91).

5. As of the date of the pretrial conference, January 23, 1981, petitioner had still not served answers to the pending discovery.

6. At the pretrial conference, petitioner's co-counsel Geigel presented a motion for withdrawal of counsel, further indicating that Ezratty would continue with the case and was aware of the pendency of the pretrial and that Geigel intended to withdraw as counsel. Ezratty had prior knowledge of the scheduled pretrial conference, yet failed to appear. (R. 103).

7. On January 27, 1981, four days after the pretrial conference, petitioner served on respondent a set of answers to interrogatories.[2] Still unanswered were the answers to the supplemental interrogatories, answers to the request for production of documents and answers to supplementary interrogatories on the issues of unseaworthiness and negligence,

[2] Many of the responses given were objected to by letters to Messrs. Geigel and Ezratty dated January 28, 1981 pursuant to Rule 8(m) of the Rules of the United States District Court for the District of Puerto Rico. No further action as to these objections was taken by respondent in light of the dismissal of the case.

all of which had been propounded on July 7, 1980. Of the depositions which petitioner had indicated were necessary, only one was taken and a copy of the transcript was never served on counsel for respondent. Likewise, the information which petitioner stipulated would be provided at the taking of his deposition, was never produced.

8. At the hearing scheduled before the trial judge February 11, 1981, counsel for petitioner failed to appear.

Arguments

I. Dismissal Of The Complaint For Failure To Respond To Discovery And For Failure To Prosecute Was Appropriate Under The Circumstances Of The Case At Bar, And Such Action Did Not Require The Holding Of A Hearing Prior To Dismissal.

The facts in this case are not in dispute. There is no question that despite repeated orders to provide answers to all pending discovery, none was forthcoming. Nor is there any dispute that notwithstanding repeated promises to provide discovery, none were kept. It is also not disputed that warnings of sanctions went unheeded. There is likewise no dispute that Ezratty failed to appear at the pretrial conference despite full knowledge of the pendency of the same and the impending withdrawal of co-counsel Geigel. Finally, there is no dispute that counsel failed to appear at the conference scheduled before the trial judge.

Under these circumstances, dismissal pursuant to Federal Rule of Civil Procedure 41(b) for failure to prosecute, and pursuant to Federal Rule of Civil Procedure 37(b)(2)(C) for failure to respond to discovery was warranted. Petitioner now claims that a hearing was required prior to dismissal and that the failure to hold such a hearing was an abuse of discretion. There is no requirement that a hearing be held prior to dis-

missal for failure to prosecute or for failure to provide discovery. Nor is there such a requirement when, as in the case at bar, elements of both are joined.

This Court emphatically held in *Link* v. *Wabash Railroad Company*, 370 U.S. 626, 633 (1961).

> Accordingly, when circumstances make such action appropriate, a District Court may dismiss a complaint for failure to prosecute even without affording notice of its intention to do so or providing an adversary hearing before acting. Whether such an order can stand on appeal depends not on power, but whether it was within the permissible range of the Court's discretion.

Petitioner argues that the Court of Appeals erred in relying on the *Link* case, which involves dismissal for failure to prosecute under Rule 41(b), when presumably dismissal could only be sought pursuant to Rule 37(b)(2). Petitioner appears to suggest that the presence of one excludes the other. This erroneous assumption is unsupported in fact or law. The facts in this case show that not only was there a total failure to respond to discovery, but also a flagrant failure to prosecute. The failure to prosecute was manifest not only as a result of failures to participate in the preparation of discovery timetables and proposed pretrial orders, but also by failures to appear at the pretrial conference and the status conference. We submit that these are not isolated acts of excusable neglect but persistent failures for which no reasonable excuse is offered.

That petitioner was afforded ample opportunity to submit explanations for his conduct and present any mitigating elements, is evidenced by the flurry of motions for reconsideration, affidavits and other motions which were filed after the events which gave rise to the dismissal had run their course. Petitioner offers nothing that could have been brought to the Court's attention which would have required a hearing or

which has not been already presented. The order of the District Court dismissing the case carefully reviews all of the facts as they occurred and is clearly supported by the record. Under the circumstances, the dismissal by the District Court and affirmation by the First Circuit was appropriate. *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976).

The facts in this case do not support even a remote suggestion that failure to give discovery was as a result of inability to comply. *Societe Internationale, Etc.* v. *Rogers*, 357 U.S. 197 (1958). To the contrary, the record shows that discovery was repeatedly promised and was never forthcoming. Nor is this a case where it could reasonably be believed that petitioner did not understand the requirements of the orders to compel discovery. The question here presented is whether gross negligence or a series of episodes of nonfeasance, amounting to a total dereliction of professional responsibilities, warranted the imposition of the severest sanction. *Cine Forty-Second St. Theater* v. *Allied Artists*, 602 F.2d 1062, 1068 (2nd Cir. 1979); *Affanato* v. *Merrill Bros.*, 547 F.2d 138 (1st Cir. 1977).

The very cases which petitioner cites to suggest abuse of discretion in ordering dismissal of the case at bar are clearly distinguishable.[3] When compared factually to the present case, it is evident that the dismissal here was fully justified and supported by the record. In *Joplin* v. *Southwestern Bell Telephone Company*, 671 F.2d 1274 (10th Cir. 1982), unlike the case at bar, the Court found petitioner had made significant efforts to comply with the Court's pretrial instructions. In *Rogers* v. *Kroger Company*, 669 F.2d 317 (5th Cir. 1982) and in *E.E.O.C.* v. *Carter Carburetor Company*, 577 F.2d 43

[3] Each of the cases cited by petitioner as supporting a finding of abuse of discretion has been examined and the facts which made these distinguishable are set forth. The case which petitioner cites of *Nealy* v. *Transportacion Maritima Mexicana*, 630 F.2d 694 (9th Cir. 1980), is unavailable for review since a note at the page where the case should appear indicates that the same "was withdrawn from the bound volume at the request of the Court."

(8th Cir. 1978), it was noted that both sides had been responsible for delay and had used dilatory tactics. Here, we are faced with compounded delays and dilatory tactics by petitioner. There is no claim of impropriety or delay on the part of respondent and in fact no such claim is supported by the record.

In *Schenck* v. *Bear, Stearns and Co., Inc.*, 583 F.2d 58[4] (2nd Cir. 1978), there had been no prior prodding of the plaintiff by the Court to require the giving of discovery and new counsel appeared at the pretrial conference and indicated a willingness to go forward with the case pursuant to a proposed timetable. In the case at bar, not only were there repeated orders to give discovery and warnings to the petitioner that sanctions might follow, but also, co-counsel Ezratty failed to appear at the pretrial conference despite knowledge that one was scheduled and knowledge that co-counsel Geigel would seek to withdraw legal representation.

The case of *Butler* v. *Pearson*, 636 F.2d 526 (D.C. Cir. 1980), is likewise clearly distinguishable from the case at bar. In *Butler*, there was not properly a failure to obey the Court's directives since the answers, while untimely, were given within the period for completion of discovery. In fact the Court noted that dismissal was ordered eight days prior to the expiration of the deadline to complete discovery. Here, we are confronted, not with a simple failure to give timely discovery in a timely fashion. Repeatedly orders to give discovery were ignored, compounded by a complete failure to prosecute.

As can be seen, the suggestion by petitioner that the decision of the Court of Appeals in the case at bar is somehow in conflict with the standards and procedures which have been fashioned in other circuits is incorrect. Clearly, each of the cases cited by petitioner is distinguishable. The analysis made by the Court of Appeals in the case at bar, the finding that

[4] Improperly cited by petitioner as appearing at 585 F.2d 60.

there was no abuse of discretion, is thoroughly supported by the record and within the guidelines established by this Court in *Link* and *National Hockey League*.

II. The Fact That Petitioner Is A Seaman Does Not Entitle Him To Treatment Or Privileges Beyond Those Of Other Litigants.

Petitioner argues that since seamen are wards of the Court and have been held entitled to beneficent treatment, the District Court abused its discretion in dismissing this action. That seamen have been held entitled to beneficent treatment is not disputed. *Garrett* v. *Moore-McCormick*, 317 U.S. 239 (1942); *Bainbridge* v. *Merchants' and Miners' Transportation Co.*, 287 U.S. 278 (1932). That they are consequently immune from the application of Rule 37(d) and Rule 41(b), does not follow.

Petitioner seeks to distinguish the cases cited by the Court of Appeals which hold that petitioner is not entitled to special treatment which would effectively allow a different standard to be applied to seamen than to other litigants. Petitioner alleges that the Court of Appeals erred in applying the case of *Kenney* v. *California Tanker Company*, 381 F.2d 775 (3rd Cir. 1969) to the case at bar. Petitioner asserts that *Kenney* is distinguishable insofar as plaintiff—not counsel—had been held to blame for the failure to prosecute. An examination of *Kenney* shows that no such distinction was made. That petitioner would seek to shift blame to counsel for his present predicament and characterize himself as a "victim" of his attorney's conduct is, of course, not surprising. Petitioner's interpretation of the *Kenney* holding is erroneous.

But, as is painfully evident from the record, dismissal does not only result from petitioner's failure to prosecute, dismissal has also been properly affirmed in cases involving seamen where discovery is not given, as when interrogatories have

gone unanswered. *Lynn* v. *American Barge Lines Company*, 226 F.2d 934 (3rd Cir. 1955); *Milewski* v. *Schneider Transportation Co.*, 238 F.2d 397 (6th Cir. 1956); *Hastings* v. *Maritime Overseas Corporation*, 411 F.2d 1201 (3rd Cir. 1969); *Kelly* v. *United States*, 338 F.2d 328 (1st Cir. 1964).

Respondent submits that the dismissal by the District Court is fully supported by the record. Clearly, petitioner ignored repeated orders to provide discovery in a manner which shows flagrant bad faith on the part of petitioner that unnecessarily delayed proceedings. The dilatory tactics of counsel for petitioner demonstrates a total disregard for their responsibilities which merited the harsh penalty of dismissal.

Conclusion

In view of the foregoing, respondent respectfully submits that dismissal of the action was proper and requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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